IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/12/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRP (PD) No.1478 OF 2003 and CRP (PD) 1479 OF 2003
AND
C.M.P.Nos.10515 AND 10516 OF 2003

C.R.P.P.D.No.1478 OF 2003

E.A.Chandrasekaran ... Petitioner

-Vs-

1.Venkatachalam
2.Maragatham ... Respondents
C.R.P.P.D.No.1479 OF 2003:

E.A.Chandrasekaran ... Petitioner

Vs.

1.P.Pushpanathan
2.Venkatachalam
3.Maragatham ... Respondents

Civil Revision Petitions filed under Section 115 of C.P.C. as stated therein.

!For Petitioner
in both CRPS. : Mr.R.Swaminathan

^For Respondents Mr.K.Sekar for
in both CRPs. : M/s Sarvabhauman Associates.

:COMMON ORDER

Both the above Civil Revision Petitions have been filed against the fair and decretal order dated 30.4.2003 respectively made in I.A.Nos.236 and 237 of 2003 in O.S.No.1370 of 2002 by the Court of Subordinate Judge, Namakkal, thereby allowing the Interlocutory Applications filed by the respondents herein under Order IX, Rule 13 r/w Order XVII, Rule 2 & Section 151 C.P.C. praying to set aside the decree passed by the said Court.

2. Tracing the history of the case, what comes to be known is that the petitioner herein filed the suit in O.S.No.733 of 1996 before this Court, which was later transferred to the Court of Subordinate Judge, Sankari and re-numbered as O.S.No.762 of 1997 and on point of jurisdiction it was again transferred to the Court of Subordinate Judge, Namakkal and re-numbered as O.S.No.1370 of 2002 praying to direct the defendants to execute and register a sale deed in favour of the plaintiff or his nominee or nominees, of the schedule property after receiving the balance sale consideration of Rs.1,75,000/-, to hand over vacant possession of the suit property, to pay mesne profits from the date of filing of the suit till delivery of the suit property and alternatively direct the defendants to pay the plaintiff a sum of Rs.11 ,00,000/- with interest at 12% per annum from the date of suit till realisation and for that purpose create a charge over the suit properties in favour of the plaintiff, for a permanent injunction restraining the defendants 2 and 3 and the 1st defendant, power of attorney agent from in any manner creating any kind of documents and restraining them from in any manner alienating and encumbering the suit property till final disposal of the suit and for costs; that the suit was contested by the respondents herein; that the suit was decreed in favour of the petitioner herein; that the respondents 2 and 3 herein have filed I.A.No.287 of 2003 and the first respondent herein has filed I.A.No.286 of 2003 under Order IX, Rule 13 r/w Order XVII Rule 2 and Section 151 of C.P.C. praying to set aside the decree on the ground that the defendants were not examined as witnesses to put forth their substantial rights and that no opportunity was given to them to crossexamine P.W.1; that though the suit was posted for cross-examination of P.W.1 on 5.12.2002 they were not able to cross-examine P.W.1, because of P.W.1 was not present on that day; that the defendants were not also given opportunity to enter defence.

3. The learned Subordinate Judge, after considering the reasons assigned on the part of the defendants and the defence taken on the part of the petitioner herein, also following the decision of the Apex Court cited on the part of the defendants would ultimately allow the applications, thereby setting aside the judgment and decree dated 5.12.2 002 made in O.S.No.1370 of 2002. It is only testifying the validity of the said fair and decretal orders, the petitioner has come forward to file the above Civil Revision Petitions on grounds that the suit itself was decreed on merits, the provisions under Order IX Rule 13 C.P.C. would not be applicable; that the impugned order was passed without jurisdiction since the decree was passed under Order XVII Rule 3 C.P.C. and was based on a detailed judgment; that the impugned order has been passed without noting that the decisions cited therein have no relevance to the facts of the case and therefore, the impugned order is not sustainable in law and ought to be set aside.

4. During arguments, the learned counsel appearing on behalf of the Revision Petitioner in both the above Civil Revision Petitions besides tracing the history of the case right from the beginning would arrive at the point that in the suit written statement was filed on 25.3.1997; that nearly 6 years the matter has been kept pending for trial to be completed; that the suit itself was dismissed for default on 29 .7.1999 and thereafter it was restored on 11.8.2002; that the trial commenced on 21.11.2002 and the decree was passed in the suit on 5.12.2002 on a detailed judgment.

5. At this juncture, the learned counsel would cite the following judgments:
(1) An unreported judgment passed by the Supreme Court of India in Civil Appeal Nos.2690 and 2691 of 2003 dated 3.4.2003.
(2) 1987(1) MLJ 20 (B.CHAMPALAL JAIN vs. M/S.CHEWARCHAND ASHOK KUMAR AND CO. REP. BY CHEWARACHAND PARICK-I)
(3) 2000(2)T.L.N.J. 285 (ARUMUGHA GOUNDER AND OTHERS vs. TMT. PALANIAMMAL AND OTHERS)

6. In the first judgment cited on the part of the petitioner, since the defendants 1 to 3 were called absent, the trial Court had decreed the suit as prayed for and thereafter the defendants had filed an Application under Order 9 Rule 13 of the CPC before the trial Court to set aside the said judgment and decree and on the said petition having been allowed by the trial Court, a revision had been filed before the High Court by the plaintiff and the same also having been dismissed, he had filed the Civil Appeal before the Honourable Apex Court. The Honourable Apex Court giving expression to Order XVII Rules 2 and 3 of C.P.C. and extracting the said Rules, would remark that the case was having imprints of an ex-parte adjudication and not of a decision on merits and there was not even any indication as to what evidence was evaluated and/or whether the merits were tested and had ultimately decided in the following terms:
"we find no infirmity in the impugned judgment to warrant interference. The appeals are dismissed but with no order as to costs."
7. In the second judgment cited on the part of the petitioner, a learned single Judge of this Court has held:
"The Court below when it closed the evidence and proceeded with the matter subsequently, it did proceed with the case under Or.17, R.3(a) C.P.C. But by virtue of the Explanations attached to Rule 2 of Or.17, C.P.C., if substantial portion of the evidence of any party had already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may in its discretion, proceed with the case as if such party were present."
8. In the third judgment cited on the part of the petitioner, after the closure of both sides' evidence and at the time of arguments, the learned counsel for the defendants reported no instructions. In such circumstances, the learned trial Judge had proceeded to decide the matter on merits and decreed the suit as prayed for, which was taken on appeal by the defendants and a learned single Judge of this Court while discussing the powers of the Court under such circumstances and giving expression to Order 17, Rule 2 C.P.C. had dismissed the appeal suit filed by the defendants. Citing the above judgments, the learned counsel for the revision petitioner would pray to allow the civil revision petitions.
9. On the part of the respondents also the following judgments would be cited by their counsel:

(1) (2003)2 M.L.J. 186 (S.C) (B.JANAKIRAMAIAH CHETTY vs. A.K. PARTHASARATHI AND OTHERS)
(2) AIR 1987 SUPREME COURT 42 (PRAKASH CHANDER MANCHANDA AND ANOTHER vs. SMT.JANKI MANCHANDA)
(3) 1988-1- L.W.368 (M.A.SUYAMBULINGAM vs. V.K.SWAMINATHAN AND ANOTHER)

(4) 1992-2-L.W. 536 (KAMAKSHI vs. JUGRAJ JAIN)

10. In the first judgment cited above on the part of the respondents, the Honourable Apex Court has held:
"In the absence any indication as regards merits of the case, preferring an appeal will be really inconsequential. It is more so when no definite ground of appeal can be pressed into service, except making generalized challenges. It certainly cannot be the legislative intent."

11. In the second judgment cited above on the part of the respondents, the Honourable Apex Court has held:
"If on a date fixed,one of the parties to the suit remain absent and for that party no evidence has been examined up to that date, the Court has no option but to proceed to dispose of the matter in accordance with O.17,R.2 in any one of the modes prescribed under O.9 of the Civil P.C. After the Amendment by Act 104 of 1976 to O.17 Rr.2 and 3 in cases where a party is absent only course is as mentioned in O.17, R.3(b) to proceed under R.2. Therefore, in absence of the defendant, the Court had no option but proceed under R.2. Similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under R.3 even if a party is absent but that discretion is limited onl y in cases where a party which is absent has led some evidence or has examined substantial part of their evidence."

12. In the third judgment cited above on the part of the respondents, the Honourable Apex Court has held:
"According to the explanation, to O.17, R.2, C.P.C. the party failing to appear should have let in evidence or a substantial portion of the evidence in order to enable the Court to proceed with the case as if the party were present. In this case the first defendant has not let in any evidence in this case. Only the plaintiff had let in evidence and the second defendant also has let in evidence. The contesting first defendant had not entered on his defence, so to say, by giving any evidence and his counsel withdrew his appearance during the examination to P.W.1. In such circumstances, in view of the Explanation to R.2 of O.17, it could not be said that the first defendant should be treated as having begun his part of the case in the suit, entitling the court to proceed with the case as if he was present. In the circumstances, the treatment of the case as ex parte was right and does not call for any interference."

13. In the last judgment cited above on the part of the respondents, even though the defendant was present in the Court, she did not participate in the hearing and her counsel was also absent and hence an ex parte decree was passed against her. The application filed by the defendant to set aside the ex parte decree was dismissed on ground that only an appeal would lie against such a judgment and that the application under Order 9 Rule 13 CPC was not maintainable. Aggrieved, the defendant preferred the Civil Miscellaneous Appeal wherein a learned single Judge of this Court has held:

"In the instant case, the defendant was present, but her counsel was not

present at the time when the case was adjourned. The defendant, even though was physically present, was incapable of participating in the proceedings, being a widow and not knowing the procedure of court. The defendant was helpless in such a situation, as she could not proceed without the assistance of her advocate. In the circumstances, the order passed by the lower Court cannot be construed as an order under Order 17 Rule 3 CPC. It has to be construed as an order under Order 17, Rule 2 CPC and the application filed under Order 9 Rule 13 CPC is maintainable."
Citing the above judgments, the learned counsel for the respondents would submit that the Court below has considered all the facts and circumstances of the case in the manner expected by law and hence no interference of this Court is required and would pray to dismiss the above civil revision petitions.

14. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that it is a suit which was originally filed in the year 1996 before this Court and thereafter it had been transferred to the Court of original jurisdiction, the Court of Subordinate Judge, Sankari with a direction to dispose of the matter within three months and thereafter on creation of a new District Namakkal, administratively, the case has been transferred to the present Court wherein the suit is pending i.e. in the Court of Subordinate Judge, Namakkal and got re-numbered as O.S.1307 of 2002. Therefore, it has to be remembered that it is a case which is kept pending for seven years.

15. In the meantime, the trial Courts have carried on their exercise of trying the said suit and ultimately even the suit had been finally disposed of decreeing the same with costs in favour of the petitioner herein and at this juncture, the respondents 2 and 3 herein have filed I.A.No.237 of 2003 and yet another I.A.No.236 of 2003 has been filed by the first respondent under Order 9 Rule 13 r/w.Order 17 Rule 2 and Section 151 CPC praying to set aside the decree on ground that the defendants were not examined as witnesses to put-forth their substantial rights and that no opportunity was given to them to crossexamine P.W.1. These two Interlocutory Applications having come to be allowed by the trial Court itself, the petitioner has come forward to file the above civil revision petitions on certain grounds as brought forth and traced supra.

16. During arguments, three decisions would be ushered in on the part of the petitioner and on the part of the respondents, four decisions have been cited justifying the order passed by the trial Court in allowing those applications.

17. It may be pointed out that the decisions cited on the part of the petitioner have been rendered by the respective Courts mentioned therein adhering to the facts and circumstances encircling those cases dealt with by them and they have little application to the facts of the case in hand. On the contrary, the decisions cited on the part of the respondents herein reveal that `in the absence of any indication as regards merits of the case, preferring an appeal will be really inconsequential; that it is more so when no definite ground of appeal can be pressed into service except making

generalized challenges, which certainly cannot be the legislative intent' as it has been held by the Honourable Apex Court in the judgment reported in (2003) II M.L.J. 186 (SC), further giving expression to Order 17 Rules 2 and 3 and Order 9 of the CPC, so far as the other judgments on the part of the respondents are concerned and therefore, no d oubt, adopting three of the four judgments cited by the respondents herein and in full consideration of those propositions held by the upper forums, the lower Court has arrived at the valid conclusion to allow the two Interlocutory Applications filed by the respondents herein.

18. Further more, in its recent judgment delivered in SUKANYA HOLDINGS (P) LTD. vs. JAYESH H.PANDYA AND ANOTHER reported in (2003) 5 SCC 531, the Honourable Apex Court has held:

"For interpretation of Section 8 (of the Arbitration and Conciliation Act), Section 5 would have no bearing. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections (1) and (2) of Section 8 of the Act."

19. When such is the legal position as clarified by the Honourable Apex Court in matters of such nature, this Court does not see any valid reason to cause its interference into the well considered and merited order passed by the Court below and hence the following order:
In result,
(i)the above civil revision petitions do not merit acceptance and they become liable only to be dismissed and are dismissed accordingly.

(ii)The common fair and decretal order dated 30.4.2003 made in I.A. Nos.236 and 237 of 2003 in O.S.No.1370 of 2002 by the Court of Subordinate Judge, Namakkal is hereby confirmed.
However, in the circumstances of the cases, there shall be no order as to costs.

Consequently, C.M.P.Nos.10515 and 10516 of 2003 are also dismissed.

Index: Yes
Internet: Yes

gr/Rao

To

The Subordinate Judge,
Namakkal.